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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID EARL WHITFIELD, Defendant and Appellant.	F074000 (Super. Ct. No. 15CMS7248) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant David Whitfield hit Raymond S. in the face with a beer bottle and later solicited a fellow jail inmate to murder Raymond. A jury convicted Whitfield of assault

by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4);[1] count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2), both with enhancements for inflicting great bodily injury (§ 12022.7, subd. (a)), and also convicted him of solicitation to commit murder (§ 653f, subd. (b)). In bifurcated proceedings, the court found true the allegations that appellant had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and two prior strike convictions (§ 667, subd. (b)-(i); § 1170.12). The court granted in part Whitfield's *Romero*[2] motion and struck the oldest of Whitfield's prior strike convictions. Whitfield was sentenced to a determinate 22-year prison term.

On appeal, Whitfield challenges the denial of his *Batson/Wheeler*[3] motion, the sufficiency of the evidence to support the great bodily injury enhancements, the partial denial of his *Romero* motion, and his conviction on two counts of assault for a single assaultive act. We requested supplemental briefing to address whether recent legislative changes require us to remand the matter for the trial court to consider striking Whitfield's prior serious felony enhancement. We also requested supplemental briefing on the effect of the trial court's failure to make express findings on prior prison term enhancements for which the court increased Whitfield's sentence by two years. (§ 667.5, subd. (b).).

We conclude Whitfield cannot be convicted of both assault by means of force likely to cause great bodily injury and assault with a deadly weapon under the facts of this case. Accordingly, we vacate Whitfield's conviction on count 1 and we strike the associated enhancement. We also remand for the trial court to exercise its discretion to

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[1] All further statutory references are to the Penal Code.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

[3] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

consider striking Whitfield's prior serious felony enhancement. We otherwise reject Whitfield's contentions and affirm the judgment.

FACTUAL BACKGROUND

Whitfield and Raymond were acquaintances who lived around the corner from each other. On the date of the incident, at approximately 3:00 p.m., Whitfield went to Raymond's home and asked him to step outside. Raymond walked out onto his front porch and Whitfield hit Raymond very hard on his upper right eyebrow. Whitfield then got on his bicycle and rode away saying, "That's what you get punk bitch."

Police were called and, when Officer Oscar Torres arrived, Raymond was bleeding and sitting near a pool of blood. Officer Torres contacted Whitfield, who admitted he hit Raymond with a 40-ounce Hurricane brand beer bottle, then left the bottle on the porch. Officer Torres found such a bottle on Raymond's porch. Raymond, however, adamantly told Officer Torres that Whitfield hit him with the closed fist of his right hand and not a bottle.

Raymond initially refused medical aid. However, at approximately 7:00 p.m., he went to the hospital and received five stitches. He had a headache that night and into the next morning. He also had a black eye. He had no long-term injuries other than a barely noticeable scar.

While Whitfield was subsequently in custody at the King's County Jail, he was housed with Phillip R. Phillip contacted the district attorney's office after Whitfield started talking to Phillip about "taking care of a problem." According to Phillip, Whitfield offered to pay $3,000 to have Raymond murdered before he could appear in court. Detectives gave Phillip a phone number and told Phillip to get Whitfield to speak with an undercover officer over the phone. During two recorded phone calls, Whitfield was reluctant to speak, and Phillip did most of the talking. Many of Whitfield's statements during the calls were inaudible. However, Whitfield eventually described

Raymond's appearance and whereabouts to the undercover officer, told the undercover officer to "go for it," and discussed payment.

DISCUSSION

I. *Batson/Wheeler* Motion

The federal and state Constitutions both prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*Batson, supra,* 476 U.S. at p. 97; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) In the trial court, Whitfield brought an unsuccessful *Batson/Wheeler* motion to challenge the prosecutor's exclusion of five Hispanic prospective jurors.[4] On appeal, Whitfield contends the trial court improperly denied the motion as to four of these prospective jurors.[5] We disagree.

A. Applicable Legal Principles

Batson/Wheeler motions are governed by a three-step procedure. " 'First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]." ' " (*Parker, supra,* 2 Cal.5th at p. 1211.)

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[4] Although Whitfield is not Hispanic, a *Batson/Wheeler* challenge may be raised even if the defendant does not share the same racial identity as the excused jurors. (*Powers v. Ohio* (1991) 499 U.S. 400, 415-416; accord, *People v. Parker* (2017) 2 Cal.5th 1184, 1212 (*Parker*).)

[5] As to C.T., the fifth juror challenged in the trial court, Whitfield concedes "the record supports the prosecutor's reasons for striking her from the venire." We therefore do not discuss in detail the voir dire of C.T. or the prosecutor's reasons for striking her.

Here, the trial court found a prima facie case of discrimination and the prosecutor offered facially race-neutral reasons in support of his strikes. Accordingly, this case involves a challenge to the trial court's decision to credit the prosecutor's facially race-neutral reasons at the third step of the *Batson/Wheeler* inquiry. "This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] At this third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider, ' "among other factors, the prosecutor's demeanor; ... how reasonable, or how improbable, the explanations are; and ... whether the proffered rationale has some basis in accepted trial strategy." ' [Citations.] To satisfy herself that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic ... may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] We recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158-1159 (*Gutierrez*.)

On appeal, "[w]e review a trial court's determination regarding the sufficiency of tendered justifications with ' "great restraint." ' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence." (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) However, a " 'trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' " (*Ibid.*)

B. Overview of Jury Selection Process

Trial courts have broad discretion over jury selection and the selection process varies. (*People v. Whalen* (2013) 56 Cal.4th 1, 29-30, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; *People v. Lenix* (2008) 44 Cal.4th 602, 608 (*Lenix*).) Here, the court advised the parties prior to jury selection that it would conduct a majority of voir dire, and the parties were instructed not to "re-ask" the court's questions absent leave of the court.

After initial questioning by the court and the removal of several prospective jurors for hardship or language barriers, 20 prospective jurors were selected from the venire panel for voir dire. The four prospective jurors at issue in this appeal, M.G., G.A., A.M, and J.G., were part of this original panel, although only M.G. was in one of the first 12 seats. After additional questioning by the court, another prospective juror was excused for cause and a replacement was seated. Then, the prospective jurors each orally provided general biographical information in response to a questionnaire presented by the court. Defense counsel declined to question the jurors. The prosecutor questioned several jurors individually but did not specifically question the jurors at issue in this appeal. The prosecutor also asked several questions of the entire panel. After both sides passed for cause, the parties exercised peremptory challenges to the prospective jurors seated in seats 1 through 12.

The People were initially satisfied with the composition of the jury, which would have included M.G. as one of 12 seated jurors. Defense counsel then excused four prospective jurors. Following defense counsel's fourth challenge, A.M. moved into one of the first 12 seats. The People then excused M.G., and his seat was taken by G.A. After defense counsel exercised another peremptory challenge, the People excused G.A., and her seat was taken by J.G. After defense counsel exercised another peremptory challenge, the People excused A.M. This challenge exhausted the original panel of 20 prospective jurors without seating a complete jury.

Nine additional prospective jurors were called up, including C.T., who was seated within the first 12 seats. Following questioning by the court, two of these prospective jurors were excused for cause and replaced. The panel of prospective jurors each provided general biographical information in response to the questionnaire presented by the court. Defense counsel again declined to question the jurors. The prosecutor questioned C.T., then sought to remove C.T. for cause. The request was denied and peremptory challenges resumed. Defense counsel excused one prospective juror, then the People excused C.T. Defense counsel passed. The People excused J.G.

At that point, defense counsel brought a *Batson/Wheeler* motion on the ground that all five of the prospective jurors excused by the People were "of Hispanic descent." The court clarified that defense counsel was "talking about persons with Spanish surnames and/or Latinos or Hispanics." The court found a prima facie case of discriminatory jury selection and invited the prosecutor to explain the challenges. As described in detail below, the prosecutor provided reasoning as to each of the jurors. The court found the reasoning credible and not pretextual and denied the motion.

Thereafter, each party excused one additional prospective juror. Finally, twelve jurors and one alternate were sworn.

C. Discussion

As Whitfield concedes, the prosecutor provided facially race-neutral justifications for each of the challenged jurors. The trial court made findings regarding the prosecutor's justifications for excusing M.G., but otherwise rendered only a global finding that the prosecutor's reasons were credible and not pretextual. We consider each of the challenged jurors in turn. We affirm the trial court's denial of Whitfield's *Batson/Wheeler* motion.

1. Prospective Juror M.G.

M.G. was an x-ray tech assistant at a local hospital, where his girlfriend also worked. He previously worked at a car wash. He had no children, but his girlfriend had a daughter in high school. Neither he nor his girlfriend had ever served on a jury.

The prosecutor explained that he "had no problem with [M.G.] until I saw other jurors coming up that I would prefer to have on the jury."[6] The prosecutor explained he excused M.G. because "he has no kids, so he has no ties to the community. He mentioned that his girlfriend did have kids. To me that means that he's not really taking responsibility for her children at all, and I also found he just generally had poor body language. He was wearing slacks and I believe his shirt was untucked, so there's –" At that point the court intervened and stated, "I believe it was a pendleton-type coat with black and brown squares that was not tucked in. It extended down past his groin and was long sleeve." The prosecutor continued, "I find that somewhat disrespectful to the court."

Following the prosecutor's explanation as to all of the jurors, defense counsel submitted without further argument. The court ruled as follows:

> "I would note first of all that [C.T.] and – let's just say this, [C.T.] and one other juror, and I don't remember which one it was, I didn't make notes as this went on. As many trials as I've done in the ten years I've been here, it's a rare occasion when I run across someone who wants to be a juror less than those two persons that [the prosecutor] excused irrespective of their race or their suspect classification.

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[6] By the time the prosecutor excused M.G., the only prospective jurors from the original panel of 20 that remained outside of the first 12 seats were G.A., J.G., and two prospective jurors who ultimately were seated, Juror No. 302633 and Juror No. 290507. Juror No. 302633 had no children and was self-employed. She had been a cosmetologist for 46 years. She previously served on a criminal jury that reached a verdict. Juror No. 290507 was the band director of a local high school. He had no children. He previously served on a criminal jury that reached a verdict. He described himself as "very available."

> "The first individual, I believe, was Mr. – I think he was seated in seat number two, [M.G.], and the Court observed their body language, especially with respect to the responses they gave to the questions.…"

The court did not otherwise describe M.G.'s body language and instead went on to discuss an African-American prospective juror who was excused for cause after expressing his desire not to sit on the jury.

The court then addressed "the specifics of" Whitfield's *Batson/Wheeler* motion and stated, "the Court, given the explanation by [the prosecutor], finds that the credibility of his proffered explanations is that the challenges were proper." The court went on to state: "In addition, the Court would find that there are an inordinate amount of individuals with Spanish surnames. It would be difficult to exercise any type of peremptory challenge without excusing someone without [sic] a Spanish surname." The court found that the reasons offered by the prosecutor were not based on race or impermissible bias and were not pretextual. The court continued, "It appears [the prosecutor] relied upon somewhat his experience. In other words, his hunches, somewhat even arbitrary, it is nonetheless permissible, because the Court finds that the reasons are not based on impermissible group bias."

Our analysis of this strike begins with the prosecutor's claim that he excused M.G. in part based on body language. It is well settled that "[p]eremptory challenges based on counsel's personal observations are not improper." (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1330, fn. 8.) A prosecutor may rely on a prospective juror's body language, manner of answering questions, or demeanor as a basis for rebutting a prima facie case of exclusion for group bias. (*Lenix, supra*, 44 Cal.4th at p. 613; *People v. Fuentes* (1991) 54 Cal.3d 707, 715 (*Fuentes*).) A prospective juror's lack of engagement in the process may also provide a basis for excusal. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 105 (*DeHoyos*); *People v. Reynoso* (2003) 31 Cal.4th 903, 925 (*Reynoso*); *People v. Ayala* (2000) 24 Cal.4th 243, 265, fn. 2 (*Ayala*).) "When the trial court's assessment of a prospective juror's capacity to serve is based at least in part on the juror's

tone, demeanor, or other elements that cannot be reflected in the written record, its ruling is owed deference by reviewing courts." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 37 (*Zaragoza*); see *People v. Mai* (2013) 57 Cal.4th 986, 1052 (*Mai*) [affirming trial court's deference to demeanor-based reasons not contradicted by the record].)

Whitfield argues deference to the trial court's decision to credit the prosecutor's demeanor-based assessment of M.G. is improper under *People v. Long* (2010) 189 Cal.App.4th 826 (*Long*) and *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder*). However, both cases are distinguishable. In *Long,* some of the prosecutor's reasons for the strike were contradicted by the record. (*Long, supra,* at p. 843-844.) The trial court did not probe these discrepancies and did not expressly credit the prosecutor's other, demeanor-based reasons. (*Id.* at p. 844-845.) On these facts, the Court of Appeal found deference to the trial court inappropriate. (*Id.* at 846-848.) Similarly, in *Snyder,* the United States Supreme Court declined to defer to a demeanor-based reason where the trial court failed to make a specific finding crediting that reason. (*Snyder, supra,* at p. 479.) Here, however, the trial court stated that M.G.'s body language reflected hostility toward jury service and then went on to credit the prosecutor's justification for the strikes. On these facts, it is apparent that the trial court independently assessed the prosecutor's proffered demeanor-based reason and found it credible. This assessment is therefore entitled to deference. (*Zaragoza, supra,* 1 Cal.5th at p. 37.)

We acknowledge that the trial court's assessment of M.G.'s body language went somewhat beyond that articulated by the prosecutor, since the prosecutor did not explain precisely what about M.G.'s body language he found objectionable. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 252 (*Miller-El*) [prosecutor must "state his reasons as best he can and stand or fall on the plausibility of the reasons he gives"].) However, the trial court is permitted to rely on its own contemporaneous observation of voir dire in determining whether the prosecutor's stated reasons are reasonable or probable (*Lenix, supra,* 44 Cal.4th at pp. 613-614), so long as the court does not substitute its own

reasoning for the rationale given by the prosecutor (*Miller-El, supra,* 545 U.S. at p. 252). "In this situation, the trial court must evaluate … whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (*Snyder, supra,* 552 U.S. at p. 477.) Here, it appears the court relied on its own observations of M.G.'s body language when determining the prosecutor's justifications were credible. Such reliance is proper.

We also acknowledge that the trial judge expressed some uncertainty as to whether M.G. was the juror he recalled being hostile to service, stating, "I don't remember which one it was, I didn't make notes as this went on." However, the court then went on to state, "The first individual, I believe, was Mr. – I think he was seated in seat number two, [M.G.] …." The court correctly identified M.G. as the "first individual" excused by the prosecutor, correctly identified M.G.'s seat in the jury box as seat number two, and also separately described M.G.'s attire. We therefore reject Whitfield's contention that the court was unable to adequately assess the prosecutor's stated reasons due to lack of recall.

Of course, body language was not the sole reason proffered by the prosecutor for excusing M.G., and the prosecutor's remaining reasons are supported by the record. The prosecutor complained that M.G.'s shirt was untucked, which the prosecutor found disrespectful to the court. The court confirmed that M.G. was wearing "a pendleton-type coat … that was not tucked in." Whitfield did not dispute this characterization in the trial court, nor does he do so now on appeal. Concern with a prospective juror's style of dress constitutes a race-neutral, nondiscriminatory reason for a strike. (*Wheeler, supra,* 22 Cal.3d at p. 275; see *Ayala, supra,* 24 Cal.4th at p. 265.)

The prosecutor also claimed to have struck M.G. in part because "he has no kids, so he has no ties to the community." While Whitfield disputes that M.G.'s childlessness reflects inadequate ties to the community, the prosecutor maintains wide latitude to excuse a juror for "arbitrary or idiosyncratic reasons" so long as those reasons are

legitimate and do not deny equal protection. (*Lenix, supra*, 44 Cal.4th at p. 613.) The fact that M.G. had no children reasonably could be perceived to mean he had fewer ties to the community than would a juror with a school aged child of his own. A prosecutor's preference for jurors with more developed community ties is an acceptable race-neutral reason for a peremptory challenge. Here, the trial judge credited the prosecutor's claimed reliance on his experience and hunches.

Whitfield nonetheless contends this reason should not be credited because, during voir dire, the prosecutor did not direct any questions to M.G.[7] "A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (*People v. Lomax* (2010) 49 Cal.4th 530, 573 (*Lomax*).) Here, however, the court advised the parties that the court would conduct a majority of voir dire, and the parties were instructed not to "re-ask" the court's questions absent leave of the court. Indeed, the court twice curtailed the prosecutor's questioning. Under these facts, we are reluctant to infer the prosecutor's failure to ask additional questions regarding M.G.'s community ties reflects on the credibility of his stated reasons for the strikes, particularly when the demeanor-based reasons are supported by the trial court's findings.

Whitfield also contends this justification is undermined by the fact three seated jurors also had no children. Whitfield did not raise this argument in the trial court. Although we nonetheless must conduct a comparative analysis for the first time on appeal if the record is adequate to permit the urged comparisons (*Gutierrez, supra,* 2 Cal.5th at p. 1174), the "inherent limitations" of review on a cold record may diminish the probative value of such analysis. (*Lenix, supra,* 44 Cal.4th at p. 622.) Thus, when the issue of comparative analysis is raised for the first time on appeal, the record "will be considered

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[7] The prosecutor asked no questions of any of the challenged jurors, and we reject this argument as to each of them on the same ground.

in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Id.* at p. 624.) Our focus is limited "to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment." (*Lomax, supra,* 49 Cal.4th at p. 572.) The purpose of our inquiry is to determine whether the prosecutor's proffered reason for striking M.G. applies just as well to an otherwise-similar non-Hispanic juror who was permitted to serve. (*Miller–El, supra,* 545 U.S. at p. 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."].)

Whitfield identifies three seated jurors he contends are comparable to M.G. in that they had no children: No. 303576, No. 302633, and No. 290507. The record does not reflect whether any of these seated jurors was Hispanic or non-Hispanic. (*Gutierrez, supra,* 2 Cal.5th at p. 1173 ["When a court undertakes comparative juror analysis, it engages in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group."].) Juror No. 290507 was a band director at a local high school and had "no children except for [his] 150 students." Juror No. 302633 was self-employed, had worked as a cosmetologist for 46 years, and lived in the county her entire life. Juror No. 303576 was an unmarried insurance agent who had lived in the county for 25 years.

Our comparison of these jurors to M.G. is exceedingly circumscribed by the fact that we have no information regarding their dress or demeanor, two factors that bore on the prosecutor's decision to strike M.G., and on which the court made express findings. Furthermore, the prosecutor's concern with M.G.'s childlessness was based on a perceived lack of community ties. In contrast, Juror No. 290507's responses reflect substantial ties to the children he taught, and Juror No. 302633 had over 45 years' experience working in the county in a relatively intimate field. These jurors were

therefore not similarly situated to M.G. on this issue. While the comparison between M.G. and Juror No. 303576 is perhaps more apt, comparative analysis is but one circumstance we consider in determining whether substantial evidence supports the trial court's conclusions. (*Lenix, supra*, 44 Cal.4th at pp. 624-627.) While some similarity between M.G. and Juror No. 303576 may tend to implicate purposeful discrimination, the remainder of the record reflects the prosecutor's stated reasons for excusing M.G. are adequately supported. Whitfield has not demonstrated those reasons are not genuine or that the court did not conduct an adequate inquiry. (See *id.*)

Finally, the prosecutor passed on M.G. several times before striking him. While this does not preclude a finding that M.G. was struck on impermissible grounds, it strongly suggests " ' "race was not a motive" ' in challenged strikes." (*Gutierrez, supra*, 2 Cal.5th at p. 1170.)

In sum, we conclude the trial court's denial of the *Batson/Wheeler* motion as to M.G. is supported by substantial evidence. Whitfield has not demonstrated it is more likely than not this strike was exercised in a manner that violates the Constitution.

2. Prospective Juror G.A.

G.A had four children who ranged in age from 11 to 32 years old. At the time of trial, she was single and worked as a correctional case records analyst for Coalinga State Hospital. G.A. previously worked as a correctional officer at various state prisons for ten years. She was a victim of a minor offense in one such facility. She left correctional work to attend beauty college, but "[t]hat didn't work out" and she returned to state employment.

G.A. had been married to two peace officers, one for 12 years and one for 5 years. She stated that she would be able to put that experience out of her mind and be fair and impartial to both sides.

G.A. also was the victim of a spousal assault 28 years prior. The perpetrator was prosecuted but G.A. elected not to go to court. She stated that nothing about her experience would cause her to have difficulty with the police, prosecution, or court.

G.A. served as a juror on two occasions 11 or 12 years prior. One case was a civil case and one was a criminal case. The criminal case involved different charges than the instant case. In the civil case, the jury reached a verdict; in the criminal case, it did not.

The prosecutor explained,

> "She was a prior correctional officer. She is no longer a correctional officer, so I wondered if she might have animus towards law enforcement. She told us that one time she had an inability to reach a verdict on a trial. She was also a victim of domestic violence, so I'm concerned that she might have some sort of animus again to the law enforcement community. She also had two separate exes who she described as peace officers. My concern would be that she again would have some sort of animus based on those prior relationships to law enforcement. But, again, I believe I passed on her also before I kicked her.[**8**] A lot of this is a strategic decision to who I prefer on the jury."

As stated above, the trial court did not make express findings regarding the prosecutor's stated reasons for striking G.A., other than making a global finding that the prosecutor's reasons for striking all the challenged jurors were credible and not pretextual. Nonetheless, the prosecutor's reasons for striking G.A. are supported by the record. G.A. previously sat on a criminal jury that could not reach a verdict. A prosecutor may legitimately strike jurors with prior hung jury experience. (*People v. Manibusan* (2013) 58 Cal.4th 40, 78; see *Davis v. Ayala* (2015) 135 S.Ct. 2187, 2207.) Additionally, G.A.'s departure from employment as a peace officer,**9** her failed marriages

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8 In fact, however, the prosecutor excused G.A. as soon as G.A. moved into one of the first 12 seats.

9 Whitfield contends G.A. was a "correctional officer who worked for the department of corrections" at the time of trial. He is incorrect. G.A. identified herself as an "ex peace officer" who was, at the time of trial, employed as a correctional case records analyst at Coalinga State Hospital.

to two peace officers, and her experience as a domestic violence victim reasonably supported an inference she may be biased against law enforcement. A prospective juror's negative experience with law enforcement is a valid basis for excusal. (*People v. Winbush* (2017) 2 Cal.5th 402, 436 (*Winbush*).) Although the prosecutor did not question G.A. individually, the court questioned G.A. at length on these points, and admonished the parties not to engage in extensive or duplicative voir dire.

Whitfield contends a comparative analysis casts doubt on the prosecutor's claim of concern over G.A.'s bias against law enforcement. He points to several potential jurors who "were either correctional officers or knew someone who was a correctional officer." With one exception, these potential jurors were all struck by the defense or excused for cause. Whitfield cites no authority for the proposition that we must consider excused jurors in our comparative analysis. In any event, none of these prospective jurors were themselves former peace officers, nor were they married to peace officers. Their responses to voir dire reflect that they are not similarly situated to G.A. with respect to potential law enforcement bias.

The one seated juror Whitfield contends is comparable to G.A. is Juror No. 306558. Juror No. 306558 reported that her father was a retired correctional officer. She and her husband worked in the retail industry and she had never served on a jury. Juror No. 306558's responses likewise reflect that she is not similarly situated to G.A. on any of the points of concern identified by the prosecutor.

The trial court's denial of the *Batson/Wheeler* motion as to G.A. is supported by substantial evidence. Whitfield has not demonstrated it is more likely than not this strike was exercised in a manner that violates the Constitution.

3. Prospective Juror A.M.

Twenty-year-old A.M. was a stay-at-home mother to her two-year-old daughter. She lived in Kings County her entire life. She had no significant other and had never served on a jury.

The prosecutor explained,

> "She was sleeping. Multiple times I saw her close her eyes and start to nod off. So when she – I believed she moved from seat number 16 to 2 as well, I decided I did not want her on the jury because she's not going to deliberate with others, she's not paying attention, she doesn't care about this process and I believe – [¶] … [¶] She also seemed sort of – [¶] … [¶] So the other thing is she seemed very nervous. She's also very young. No children. No ties to the community. Those are all things I would consider make a bad juror."

The prosecutor's primary stated reasons for striking A.M. were based on demeanor: she was sleeping, inattentive, and seemed nervous. These characterizations were not disputed by defense counsel at trial. As stated, a prosecutor may rely on a prospective juror's body language, manner of answering questions, demeanor, or lack of engagement as legitimate bases for excusal. (*Fuentes, supra*, 54 Cal.3d at p. 715; *Zaragoza, supra,* 1 Cal.5th at p. 37; *DeHoyos, supra*, 57 Cal.4th at p. 105; *Reynoso, supra,* 31 Cal.4th at p. 925.) The trial court's assessment of such reasons is entitled to deference. (*Zaragoza, supra,* 1 Cal.5th at p. 37; see *Mai, supra,* 57 Cal.4th at p. 1052.) Our Supreme Court has deferred to demeanor-based reasons offered in support of a prosecutor's exercise of peremptory challenges, even absent any specific comment or finding from the trial court crediting those reasons, where those reasons were undisputed in the trial court. (*People v. Hardy* (2018) 5 Cal.5th 56, 82 (*Hardy*) [" '[T]he prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court.' "].)[10] In light of Whitfield's failure to dispute the

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[10] In *Snyder, supra,* the United States Supreme Court disregarded a prosecutor's demeanor-based reason for a strike because the trial court had not made any specific finding crediting that reason. (*Snyder, supra,* 552 U.S. at p. 479.) The Court stated it could not "presume that the trial judge credited" the prosecutor's demeanor-based reason (as opposed to the other reason offered in support of the strike) absent some showing the trial judge made a determination concerning the prospective juror's demeanor. (*Ibid.*)

prosecutor's characterization of A.M.'s demeanor or any other record evidence to the contrary, we defer to the trial court's global determination that the prosecutor's proffered reasons were credible.

Additionally, the prosecutor proffered another, race-neutral reason for striking A.M., i.e., that she was young. The record shows that A.M. was 20 years old. A potential juror's youth is a race-neutral reason that can support a peremptory challenge. (*Lomax, supra*, 49 Cal.4th at p. 575.) " 'Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication.' " (*Hardy, supra*, 5 Cal.5th at p. 77.) Such is the situation here.

We acknowledge the prosecutor also supported excusing A.M. by claiming, incorrectly, that A.M. had no children.[11] In fact, A.M. was a stay at home mother. A genuine mistake – even one that goes unnoticed in the trial court – can be a race-neutral reason. (*People v. Williams* (2013) 56 Cal.4th 630, 661; *People v. Jones* (2011) 51 Cal.4th 346, 366 (*Jones*).) An " 'isolated mistake or misstatement' " does not compel a conclusion that the proffered justification was not sincere. (*Jones, supra*, 51 Cal.4th at pp. 366, 368.) Nonetheless, a trial court "should be suspicious when presented with reasons that are unsupported or otherwise implausible," (*People v. Silva* (2001) 25 Cal.4th 345, 385 (*Silva*)), and a prosecutor's unsupported reasons may undermine the credibility of the explanation (*People v. Turner* (1986) 42 Cal.3d 711, 723-725). In

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We recognize there is some tension between *Snyder* and *Hardy* on this point. (See *Hardy, supra*, 5 Cal.5th at p. 117 (dis. opn. of Liu, J.) ["In these circumstances, a demeanor-based reason does not weigh in favor of the prosecutor's credibility[.]"].) Nonetheless, we are bound to follow our Supreme Court's determination that deference is owed to the trial court's global credibility finding, even absent any specific findings regarding demeanor. (*Hardy, supra,* at p. 82; *Zaragoza*, *supra*, 1 Cal.5th at p. 37.)

[11] The prosecutor also stated A.M. had no ties to the community and, based on the prosecutor's justification for his strike of M.G., it appears this conclusion was derived from A.M.'s perceived childlessness. Additionally, the prosecutor incorrectly stated that A.M. moved into seat 2, when in actuality she moved into seat 5.

general, when a prosecutor's reasons are contradicted by the record, reviewing courts require more from the trial court than a "global finding that the reasons appear sufficient." (*Silva, supra,* 25 Cal.4th at p. 386; *Gutierrez, supra,* 2 Cal.5th at p. 1171.) However, where the error is slight and the defendant fails to object, reversal is not warranted merely because the trial court failed to probe the discrepancy or make more detailed findings. (See *Hardy, supra,* 5 Cal.5th at pp. 80-81.)

Here, the prosecutor cited A.M.'s purported childlessness, along with her youth and lack of community ties, as factors making her a bad juror. This calculation is not substantially altered by the fact A.M. was the mother of a two-year-old. Although A.M. lived in the county her entire life, her lack of employment outside the home and the young age of her child demonstrated little community affiliation under the standards articulated by the prosecutor. Considering the totality of the record before us, the legitimate reasons articulated by the prosecutor weigh against an inference that the misstatement about A.M.'s childlessness was an effort to conjure a race-neutral explanation or to conceal racial bias.

In sum, Whitfield has not demonstrated it is more likely than not this strike was exercised in a manner that violates the Constitution.

4. Prospective Juror J.G.

J.G. and his girlfriend both worked as security guards. He had three children ranging in age from 10 to 15. His girlfriend had two children aged 13 and 15. He previously served on a criminal jury.

The prosecutor explained,

> "I passed on him multiple times before I ultimately excluded him.[**12**] A lot of this came down to the front row of jurors being possibly more desirable than the people I excluded in strategy. But he has a tattoo on his arm that to

12 After J.G. entered the first twelve seats, the prosecutor excused A.M. and C.T., then excused J.G.

> me that looks like Satan. To me that's really antisocial behavior to tattoo that figure on your arm. He was unsure of his own kids age. He hesitated for a while. He's a private security guard, which – like I said, I was okay with him. He's not the worst possible juror, but kind of calculous of other people coming. Those are all factors to me that seem like someone – security guards often want to be peace officers themselves and sometimes they have a bias against law enforcement, in my own personal experience."

Whitfield did not below, and does not now, contest the prosecutor's claim that J.G. bore what appeared to be a satanic tattoo. Unusual aspects of a prospective juror's appearance are acceptable bases for a peremptory challenge. (*People v. Elliott* (2012) 53 Cal.4th 535, 566-569 [prospective juror excused based on " 'bizarre,' " and " 'odd appearance' "]; *People v. Ward* (2005) 36 Cal.4th 186, 202 [prospective juror excused for "unconventional" appearance].) The reason for this challenge is sufficiently self-evident as to not require additional explication from either the prosecutor or the court. (*Hardy, supra,* 5 Cal.5th at p. 77.) Absent an objection or other evidence to the contrary, we defer to the trial court's implied determination that this reason was bona fide. (*Lenix, supra,* 44 Cal.4th at p. 614.)

The prosecutor also claimed to have excused J.G. in part because he hesitated in stating his children's ages. While the transcript does not reflect such hesitation, defense counsel did not object to this characterization in the trial court. Furthermore, although this reason is somewhat arbitrary, the trial court expressly found that the prosecutor's reasons, although "somewhat even arbitrary," were not pretextual. We therefore defer to the trial court's determination that the prosecutor's reasons were proper. (*Hardy, supra,* 5 Cal.5th at p. 82.)

Lastly, the prosecutor justified the strike by citing to J.G.'s employment as a security guard as a potential source of law enforcement bias. A prospective juror's occupation and bias against law enforcement are legitimate and plausible race-neutral bases for a peremptory challenge. (*People v. Chism* (2014) 58 Cal.4th 1266, 1317; *Winbush, supra,* 2 Cal.5th at p. 436.) However, as Whitfield points out, another seated

juror, Juror No. 299805, also was a security guard. Neither J.G. nor Juror No. 299805 expressed any views regarding law enforcement. Thus, the only potential factor relating to law enforcement bias (i.e., employment as a security guard) applies equally to both J.G. and Juror No. 299805. This reason therefore does not hold up to a comparative analysis.

Nonetheless, we cannot conclude that Juror No. 299805 and J.G. were similarly situated overall. As stated, the prosecutor's primary reason for striking J.G. was his satanic tattoo. While the reasons for striking J.G. were perhaps weaker than those offered for striking the other challenged jurors, the prosecutor himself acknowledged J.G. was not "the worst possible juror." The court then credited the prosecutor's reliance on his "hunches" as being nondiscriminatory. Considering the totality of the record, the presumption that peremptory challenges are exercised in a constitutional manner, and the " ' "great restraint" ' " with which we review a trial court's determination regarding the sufficiency of tendered justifications, we conclude the trial court's denial of the motion as to J.G. is entitled to deference. (See *Gutierrez, supra,* 2 Cal.5th at p. 1159.)

5. Conclusion

For the reasons stated, we conclude the trial court adequately considered the prosecutor's reasons for challenging each of these jurors and the record sufficiently supports the denial of Whitfield's *Batson/Wheeler* motion.

II. Evidence of Great Bodily Injury

As to both assault counts, the jury found that Whitfield inflicted great bodily injury on Raymond within the meaning of section 12022.7, subdivision (a). Whitfield contends the evidence that Raymond suffered a laceration requiring five stitches was insufficient to establish that Raymond suffered great bodily injury. We disagree.

In reviewing the sufficiency of the evidence, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*Cravens*, 53 Cal.4th at p. 508.)

Section 12022.7, subdivision (a) authorizes additional punishment for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony …." "Great bodily injury" is defined as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) "[T]he determination of great bodily injury is essentially a question of fact, not of law. ' "Whether the harm resulting to the victim ... constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding." ' " (*People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).)

Here, there was sufficient evidence to support the jury's finding of great bodily injury. Raymond was hit in the face with a beer bottle, resulting in a cut which bled profusely and required five stitches. He went to the hospital for medical treatment and was left with a scar on his face, although the scar was barely noticeable at the time of trial. While a jury would not necessarily conclude a wound to the face that bled profusely and required five stitches constituted great bodily injury, it could reasonably do so. We therefore cannot say as a matter of law that this injury was insufficient to support the jury's finding.

Whitfield's contrary argument relies on several cases predating *Escobar, supra,* 3 Cal.4th 740. However, *Escobar* established the current standard for reviewing a jury's

finding of great bodily injury under section 12022.7. Whitfield's reliance on earlier cases is questionable; in any event, the cases are readily distinguishable.

In *People v. Martinez* (1985) 171 Cal.App.3d 727, the court considered the severity of injuries inflicted on two victims. One victim's tendons were cut resulting in permanent disability to her hand, and the Court of Appeal found this evidence sufficient to support the great bodily injury allegation. (*Id.* at pp. 732, 735.) The other victim received "a little stab" or "pinprick" in the back through several layers of clothing and was not taken to a hospital, and the court found this evidence insufficient to support the enhancement. (*Id.* at pp. 735-736.) Here, in contrast, Raymond did not suffer a "pinprick," but a laceration with sustained bleeding that required medical intervention and left him with a scar.

People v. Covino (1980) 100 Cal.App.3d 660, which Whitfield also cites, involved "slight reddening of the skin without any substantial damage to bodily tissues." (*Id.* at p. 667.) The injury in *Covino* is therefore dissimilar from that in the instant case. More importantly, *Covino* did not involve section 12022.7; it involved assault by force likely to produce great bodily injury under section 245, subdivision (a), which does not require any injury at all. (*Ibid.*)

Finally, *People v. Nava* (1989) 207 Cal.App.3d 1490, did not involve a challenge to the sufficiency of the evidence but rather an erroneous instruction informing the jury that a bone fracture constituted great bodily injury as a matter of law. (*Id.* at p. 1499.) *Nava* merely confirms that the great bodily injury determination is a question of fact reserved to the properly instructed jury.

For the reasons stated, the evidence in this case was sufficient for the jury to find the great bodily injury allegations true.

III. Multiple Violations of Section 245

Whitfield was charged with assault by means likely to cause great bodily injury (§ 245, subd. (a)(4); count 1), and assault with a deadly weapon other than a firearm

(§ 245, subd. (a)(1); count 2), both arising out of the same assaultive act of hitting Raymond in the face with a beer bottle. The jury convicted Whitfield as charged. The court sentenced Whitfield on count 2 and imposed but stayed the sentence on count 1 pursuant to section 654. On appeal, Whitfield contends he committed only one offense of assault and the duplicative offense in count 1 therefore must be vacated. We agree.

A. Relevant Legal Principles

Section 954 generally governs multiple offenses or multiple statements of an offense, and provides in relevant part:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged …."

Section 954 " 'authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.' " (*People v. Vidana* (2016) 1 Cal.5th 632, 650 (*Vidana*).) Whether statutory provisions "define different offenses or merely describe different ways of committing the same offense properly turns on the Legislature's intent in enacting these provisions, and if the Legislature meant to define only one offense, we may not turn it into two." (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537 (*Gonzalez*).)

In *Gonzalez,* the defendant was convicted of oral copulation of an unconscious person in violation of section 288a, subdivision (f) and oral copulation of an intoxicated person in violation of section 288a, subdivision (i) based on the same act. (*Gonzalez, supra,* 60 Cal.4th at p. 536.) In concluding that the Legislature intended these

subdivisions to define separate offenses, the court primarily relied on the structure of the statute:

> "Subdivision (a) of section 288a defines what conduct constitutes the act of oral copulation. Thereafter, subdivisions (b) through (k) define various ways the act may be criminal. Each subdivision sets forth all the elements of a crime, and each prescribes a specific punishment. Not all of these punishments are the same. That each subdivision of section 288a was drafted to be self-contained supports the view that each describes an independent offense, and therefore section 954 is no impediment to a defendant's conviction under more than one such subdivision for a single act."

(*Gonzalez, supra,* at p. 539.)

Subsequently, in *Vidana*, our Supreme Court considered whether larceny and embezzlement were different offenses, or merely different statements of the same offense. (*Vidana, supra,* 1 Cal.5th at p. 648.) The court noted that larceny and embezzlement have different elements and are found in "self-contained statutes." (*Ibid.*) However, these factors were not dispositive. Instead, the court looked to section 490a, which provides that any statute that mentions larceny or embezzlement " 'shall hereafter be read and interpreted as if the word "theft" were substituted therefor.' " (*Ibid.*) The court concluded the "obvious intent" of section 490a "was to create a single crime of theft." (*Ibid.*) Additionally, the court noted that larceny and embezzlement "generally have the same punishment." (*Id.* at pp. 648-649.) Thus, the court concluded, larceny and embezzlement "are simply different ways of describing the behavior proscribed by those statutes." (*Id.* at p. 649.) Only one such conviction based on the same act could be sustained.

B. Application to Section 245

Section 245, subdivision (a)(1) previously set forth a single offense of "assault upon the person of another with a deadly weapon or instrument *or* by any means of force likely to produce great bodily injury…." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5,

italics added.) Thus, assault with a deadly weapon and assault by means likely to produce bodily injury were not separate offenses, but rather two alternative means of committing the same offense. (*Ibid.*; *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 972 (*Jonathan R.*).) In cases involving a weapon that was not itself inherently dangerous, the two clauses of section 245, subdivision (a)(1) were considered "functionally identical" because non-inherently dangerous instruments become deadly weapons only by "their use in a manner capable of producing great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1030, 1035 (*Aguilar*).)

In 2011, the two variants of assault described under former subdivision (a)(1) were placed in separate paragraphs of subdivision (a), that is paragraphs (a)(1) and (a)(4). (Stats. 2011, ch. 183, § 1.) "According to the bill's author, the purpose of the amendment was to make it easier for prosecutors and defense attorneys to determine whether a defendant's past aggravated assault conviction involved the use of a weapon when examining a defendant's criminal history," since past aggravated assault convictions involving the use of a weapon are treated differently for purposes of certain recidivist provisions than those not involving a weapon. (*Jonathan R., supra,* 3 Cal.App.5th at p. 971 [citing Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) Apr. 26, 2011, pp. 1–2.]) The amendment was described as a "technical, nonsubstantive" change (*Jonathan R.*, at p. 971 [citing Legis. Counsel's Dig., Assem. Bill No. 1026 (2011-2012 Reg. Sess.)]), that " 'does not create any new felonies or expand the punishment for any existing felonies.' " (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1105 (*Brunton*) [citing Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3]).

As amended, section 245 now reads, in relevant part:

> "(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county

> jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment. [¶] … [¶]
>
> "(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

Courts have reached differing conclusions as to whether these two subsections constitute different offenses. In *Jonathan R.*, the First District Court of Appeal felt itself constrained by "[t]he Supreme Court's latest word on the issue of multiple convictions," that is *Gonzalez, supra,* 60 Cal.4th 533. (*Jonathan R., supra,* 3 Cal.App.5th at p. 969.) The court explained:

> "The statutory structure of section 245 is indistinguishable from that of section 288a. Each subdivision of section 245 sets out different circumstances under which a person can commit aggravated assault, and each subdivision specifies the punishment applicable to those circumstances. The reasoning of *Gonzalez* would therefore classify each subdivision as a separate offense and permit more than one conviction based upon the violation of more than one subdivision of section 245." (*Jonathan R., supra,* 3 Cal.App.5th at p. 970.)

The court resisted consideration of section 245's legislative history, stating:

> "The rationale of *Gonzalez* precludes such an analysis. The court held, in effect, that the Legislature is deemed to have intended to create separate offenses whenever a statute isolates violations with separate elements and punishments in separate subdivisions. Under *Gonzalez*, this statutory structure was held to be an element of the plain language of the statute, and that language was held to be unambiguous in creating separately convictable offenses. Given the absence of ambiguity, expressions of intent in a statute's legislative history are irrelevant to its interpretation." (*Jonathan R., supra,* 3 Cal.App.5th at p. 971.)

Although the court in *Jonathan R.* concluded the two subdivisions constituted separate offenses, it nonetheless vacated the defendant's conviction under section 245, subdivision (a)(4) on the ground it was necessarily included within his conviction under subdivision (a)(1) based on the rationale of *Aguilar, supra,* 16 Cal.4th at pp. 1029-1036.

(*Jonathan R., supra,* 3 Cal.App.5th at pp. 971-975.) Specifically, "[w]hen a defendant commits an assault using an instrument other than a firearm, the instrument is considered to be a 'deadly weapon,' and therefore to qualify under section 245, subdivision (a)(1), only if the instrument is used in a manner that is likely to produce death or great bodily injury. For that reason, when assault with a deadly weapon other than a firearm is found to have occurred, the trier of fact necessarily must have concluded the defendant used or attempted to use force likely to produce great bodily injury, since that likelihood is what makes a weapon or instrument 'deadly.' " (*Jonathan R., supra,* at p. 973.)

More recently, the Fourth District Court of Appeal rejected the holding in *Jonathan R., supra,* 3 Cal.App.5th at pp. 971-975, that subdivisions (a)(1) and (a)(4) of section 245 constitute separate offenses. (*Brunton, supra,* 23 Cal.App.5th 1097.) In *Brunton*, the court noted that *Gonzalez* was no longer the " 'Supreme Court's latest word on the [section 954] issue' " because the Supreme Court had since issued its decision in *Vidana, supra,* 1 Cal.5th 632. (*Brunton, supra,* at p. 1106.) *Brunton* noted that the *Vidana* court "undertook a detailed analysis of the legislative history behind the larceny and embezzlement statutes, concluding they constituted mere restatements of the same offense, even though they 'have different elements,' 'neither is a lesser included offense of the other,' and they are found in 'self-contained' statutes." (*Brunton, supra,* at pp. 1106-1007.)

The *Brunton* court then considered the legislative history of section 245, including prior judicial construction that concluded subdivision (a)(1) set forth only one offense, and subsequent legislative statements indicating that amendments that separated this subdivision into two separate paragraphs were mere technical changes that did not create any new felonies. (*Brunton, supra,* 23 Cal.App.5th at p. 1107.) Based thereon, the *Brunton* court concluded "section 245, subdivisions (a)(1) and (a)(4) are merely different statements of the same offense such that the defendant may not be convicted of violating both subdivisions." (*Brunton, supra,* at p. 1107.)

C. Analysis

Brunton's holding applies here. As *Brunton* made clear, when both types of aggravated assault are "based on a defendant's single act of using a noninherently dangerous object in a manner likely to produce great bodily injury," the defendant may not be convicted twice. (*Brunton, supra,* 23 Cal.App.5th at p. 1107.) Both count 1 and count 2 were based on the single act of Whitfield attacking Raymond with a beer bottle, a noninherently dangerous object. (See *People v. Graham* (1969) 71 Cal.2d 303, 327-328 [" 'instrumentalities ... such as ordinary razors, pocket-knives, hatpins, canes, hammers, hatchets and other sharp or heavy objects, which are not weapons in the strict sense of the word and are not "dangerous or deadly" to others in the ordinary use for which they are designed, may not be said as a matter of law to be "dangerous or deadly weapons" ' "].). The prosecutor made clear in closing that the two different counts were based on the same conduct, and argued that count 2 was merely an "alternative theory" to count 1, involving "the exact same conduct, the exact same crime." As the jury's verdict necessarily implies, the bottle was used by Whitfield in a manner likely to produce great bodily injury, and thus became a deadly weapon under the circumstances.

Applying *Brunton* here, we conclude that the convictions in count 1 and count 2 were based on different statements of the same offense because both were based on Whitfield's use of a noninherently dangerous object in a manner likely to produce great bodily injury. As our Supreme Court has explained, " 'section 954 ... does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.' " (*Vidana, supra,* 1 Cal.5th at p. 650.) Accordingly, one of the assault counts must be dismissed pursuant to section 954.[13]

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[13] Our conclusion would be the same, even if we concluded section 245, subdivisions (a)(1) and (a)(4) set forth different offenses, because count 1 would constitute a necessarily included offense of count 2. (See *Jonathan R., supra,* 3 Cal.App.5th at p. 963.) Although the People argue *Jonathan R.* was wrongly decided

We therefore dismiss Whitfield's conviction for assault by means of force likely to produce great bodily injury (count 1) and the associated great bodily injury enhancement. (See *People v. Ryan* (2006) 138 Cal.App.4th 360, 371 [Court of Appeal should affirm the conviction that "more completely cover[s]" the defendant's conduct].) Whitfield's aggregate sentence remains the same because the trial court stayed sentence on count 1 pursuant to section 654.

IV. Sentencing Issues

In addition to the substantive offenses, Whitfield was charged with several sentencing enhancements relating to his prior criminal history. On counts one and two, he was charged with having suffered a prior serious felony conviction in 1987 for robbery. (§ 667, subd. (a)(1).) On all counts, he was charged with having suffered prior strike convictions for the same robbery and for a 1978 assault conviction (§ 1170.12, subd. (a)-(d); § 667 (b)-(i)), and with having suffered three prior prison terms for the robbery, the assault, and a 1994 conviction for transportation or sale of a controlled substance. (§ 667.5, subd. (b)).

In bifurcated proceedings, the court found true the prior conviction allegations. Although evidence was admitted to support the prior prison term allegations, the court made no express findings regarding the truth of these allegations. Whitfield moved, pursuant to *Romero, supra,* 13 Cal.4th at pp. 529-530 to strike the prior strike enhancements. The court granted the motion in part and struck Whitfield's prior strike for assault; the court declined to strike the prior strike for robbery.

Ultimately, the court sentenced Whitfield as follows: On count 3, the court sentenced Whitfield to the middle-term of 6 years, doubled pursuant to the "Three Strikes" law, plus 1 year for each of two prison priors, for an aggregate term of

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because it did not address inherently dangerous objects, the holding in *Jonathan R.* is limited to convictions involving the use of non-inherently dangerous objects.

14 years.[14] On count 2, the court sentenced Whitfield to 1 year (one-third of the middle term of three years), doubled to 2 years pursuant to the "Three Strikes" law, plus 1 year for the great bodily injury enhancement and 5 years for the prior serious felony enhancement, for a total term of 8 years, to be served consecutively to count 1. On count 1, the court imposed but stayed a sentence of 1 year, doubled to 2 years pursuant to the "Three Strikes" law, plus 1 year for the great bodily injury enhancement, plus 5 years for the prior serious felony.

Whitfield contends his *Romero* motion to strike his prior strike conviction for robbery was improperly denied. We also requested briefing on the effect of recent statutory amendments that afford sentencing courts discretion to strike a prior serious felony enhancement and on the effect of the trial court's failure to make express findings on the prior prison term allegations. We address these issues in turn.

A. *Romero* Motion

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra,* 13 Cal.4th at pp. 529-530.) In considering whether to strike a prior strike conviction, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).

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[14] The court apparently declined to impose a prior prison term enhancement for the robbery conviction because the sentence was to be enhanced for this same conviction under section 667, subdivision (a). (See *People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153 [same prior conviction cannot be used as the basis for both a prior serious felony enhancement and a prior prison term enhancement].) However, the court did not expressly strike the enhancement. (*Ibid.*; *People v. Anderson* (2018) 5 Cal.5th 372, 426.)

In the absence of an affirmative record to the contrary, the court is presumed to have considered all relevant factors. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

We review a trial court's denial of a *Romero* motion for abuse of discretion. (*Carmony, supra,* 33 Cal.4th at p. 375.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.) Hence, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*Id.* at p. 378.)

Here, the court found true the allegation that Whitfield suffered a prior strike conviction for assault with a deadly weapon (§ 245, subd. (a)) in 1978, and a second strike conviction for robbery (§ 211) in 1987. Whitfield moved to dismiss both strikes pursuant to section 1385 and *Romero*. The court granted the motion as to the 1978 conviction but denied it as to the 1987 conviction. The court noted that a lack of information regarding the underlying facts of the 1978 conviction, the age of the offense, Whitfield's relatively young age at the time the offense was committed, his advanced age at the time of sentencing, and his lack of any significant record prior to the 1978 offense were bases for striking that strike. However, the court viewed the 1987 conviction as "more serious" and noted, "[T]he defendant has certainly not led a conviction free life since then. He has been in and out of prison. The only period of time that I could find in

the probation department [sic] that led me to believe that he didn't commit acts of -- that violated the law, were the time that he was in state prison." The court noted that Whitfield previously had been sentenced to a life term but was released pursuant to section 1170.126. Within a year of release, however, he committed a violation of Health and Safety Code section 11550 and subsequently committed the instant offenses. Based on these factors, the court declined to strike the 1987 conviction.[15]

On appeal, Whitfield emphasizes his 1987 conviction occurred 28 years prior to the instant offenses. While it is true that many years had elapsed since the 1987 conviction, remoteness for purposes of *Romero* is not determined solely by the Gregorian calendar. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 (*Humphrey*).) Instead, remoteness connotes "a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways." (*Ibid.*) Here, however, the record establishes a "lack of meaningful crime-free periods." (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) Except for periods of incarceration, Whitfield "led a continuous life of crime after the prior." (*Humphrey*, *supra*, at p. 813)

We also disagree with defendant's characterization of his conviction history as relatively non-serious. The 1987 robbery conviction itself involved threatening the victim with a screwdriver. The instant offense involved assault and a subsequent attempt to avoid prosecution through solicitation of murder. If anything, this history evinces a pattern of escalating gravity.

Whitfield also cites to his drug addiction, age, medical issues, and letters of community support as grounds for striking the conviction. These factors alone are unavailing. His alleged addiction to drugs does not excuse his continuous commission of

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15 Whitfield incorrectly states that the trial court stated "it was not making any findings with regards to the 1987 prior conviction." Instead, the trial court stated it was not ruling on the prior prison term allegations at that particular time. The court subsequently addressed the prior prison term allegations when imposing sentence.

crimes while out of custody. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) The remaining factors are not so extraordinary as to place Whitfield outside the spirit of the Three Strikes law. (See *Carmony, supra,* 33 Cal.4th at p. 378.)

In sum, considering Whitfield's lengthy criminal history, the increasing seriousness of his offenses, and the circumstances of his background, character, and prospects, we cannot say that all reasonable people would agree he fell outside the spirit of the Three Strikes law. Accordingly, the trial court did not abuse its discretion in denying his request to strike the prior strike conviction pursuant to *Romero*.

B. Prior Serious Felony Enhancement

The trial court enhanced Whitfield's sentence by five years pursuant to section 667, subdivision (a). At the time, the court lacked discretion to do otherwise. As the applicable statutes then read, the court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (§ 667, former subd. (a)(1)), and it had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (§ 1385, former subd. (b)).

Senate Bill No. 1393 has removed these restrictions, effective January 1, 2019. As Whitfield's case is not yet final, the People concede the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply to him, and remand is required.

C. Prior Prison Term Enhancements

The trial court enhanced Whitfield's sentence by two years for having suffered two prior prison terms pursuant to section 667.5, subdivision (b), but did not expressly find true the prior prison term allegations.

The People contend the trial court's imposition of sentence on the prior prison term allegations constitutes an implied finding that the allegations are true. Whitfield

argues that the trial court's silence on the allegations should be construed as a "not true" finding. The cases relied on by Whitfield are distinguishable. We agree with the People that, pursuant to *People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17, we must construe the trial court's imposition of sentence on the prior prison term allegations as a true finding under the circumstances presented here.

DISPOSITION

Whitfield's conviction on count 1 for assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)) is dismissed and the associated great bodily injury enhancement is stricken. The matter is remanded for the trial court to consider striking the prior serious felony enhancement. We direct the trial court to prepare a new abstract of judgment and forward it to the appropriate authorities. In all other respects, the judgment is affirmed.

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SNAUFFER, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.